No. 97-122

In the Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF MONROE, GEORGIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court properly enjoined the City of Monroe, a jurisdiction subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965, from implementing an unprecleared voting requirement instituted after the coverage date of Section 5.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Pursuant to Rule 18.6 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-37a) is reported at 962 F. Supp. 1501.

JURISDICTION

The order of the three-judge district court granting summary judgment for the United States and entering a permanent injunction against appellants was filed on April 15, 1997 (J.S. App. 38a-39a), and judgment was entered on April 21, 1997 (J.S. App. 40a-41a). A notice of appeal was filed on May 21, 1997 (J.S. App. 42a-43a), and the jurisdictional statement was filed on July 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATUTORY PROVISION INVOLVED

This appeal involves Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c (reproduced at J.S. App. 44a-46a). Contrary to the appellants' assertion (J.S. 2), this appeal does not involve Section 2 of the Voting Rights Act, 42 U.S.C. 1973.

STATEMENT

The appeal taken by the City of Monroe, Georgia, et al. (the City) is from the order of the three-judge district court in *United States* v. *City of Monroe*, No. 94-45-ATH (M.D. Ga.), permanently enjoining the City "from further implementing the majority vote requirement in mayoral elections unless and until preclearance * * * is obtained" under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c (J.S. App. 38a-39a). Notwithstanding the City's focus in its factual statement (J.S. 3-5) on the details of negotiations with the United States which ultimately led to preclearance of its use of single-member districts and majority voting in city council elections, the pertinent facts for purposes of this appeal are those relating to the City's adoption and implementation of an unprecleared majority vote requirement for its mayoral elections. The district court explicitly "f[ou]nd the parties in agreement as to the facts material to this litigation" (J.S. App. 3a n.1), as set forth in the court's opinion (*id.* at 3a-12a) and below.

1. The State of Georgia and its subdivisions, including the City of Monroe, are subject to the preclearance requirements of Section 5.[1] As of November 1, 1964, the coverage date for Section 5, candidates for nomination or election to the mayor's office in the City of Monroe prevailed if they received a plurality

[1] The text of Section 5 is reprinted at J.S. App. 44a-46a.

of the votes cast. The city charter in effect at that time did not specify whether majority or plurality voting applied, but set forth only a single election date, the first Thursday in December, and did not provide for a run-off election. J.S. App. 3a.

On February 28, 1966, the State of Georgia enacted local legislation, Act 150 (H.B. 230), 1966 Ga. Laws 2457, amending the charter of the City of Monroe. The 1966 charter amendment imposed a majority vote requirement for elections to the mayor's office,[2] and provided for a run-off election if no candidate received a majority in the December municipal elections. The City did not submit Act 150 to the Attorney General for Section 5 review or seek a declaratory judgment from the United States District Court for the District of Columbia declaring that the majority vote requirement for the City of Monroe has neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. J.S. App. 3a. Thus, although the City changed its election procedure pursuant to Act 150 to include a majority vote requirement, this change was never precleared and therefore was legally unenforceable.

On April 4, 1968, the State of Georgia enacted Act 998 (S.B. 151), 1968 Ga. Laws 885, known as the 1968 Municipal Election Code (1968 Code). Prior to enactment of the 1968 Code, the State did not have a comprehensive municipal election code; instead, each municipality's charter governed the conduct of its own elections, including specifying whether elections were to be determined by majority or plurality vote.

[2] The majority vote requirements referred to throughout this memorandum also apply to city council elections. This appeal, however, relates only to the use of majority voting in mayoral elections.

Section 34A-1407(a) of the 1968 Code (recodified without substantive change at Ga. Code Ann. § 21-3-407 (Michie Supp. 1997)) provided:

> If the municipal charter or ordinance, as now existing or as amended subsequent to the effective date of this Subsection, provides that a candidate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office.

Thus, the 1968 Code continued the past practice of deferring to local election law, requiring a majority vote in municipal elections *unless* a city's charter or ordinance affirmatively provides for a plurality vote or is subsequently amended to provide for a plurality vote. The City of Monroe did not take any action or change any election practice or procedure pursuant to the 1968 Code.

On May 13, 1968, the State of Georgia submitted the 1968 Code to the Attorney General for Section 5 review. The State's submission did not specify which municipalities would be required to change from a plurality vote requirement to a majority vote requirement, and did not request preclearance for each such municipality.[3] Instead, the State stated in its submission that "[w]hether the majority or plurality rule is in effect in [any] municipal election will depend upon how the municipality's charter is written at present

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[3] According to the 1990 Census, there are 535 municipalities in Georgia.

or may be written in [the] future," and that, "[i]n view of the variety of laws which heretofore existed, no effort will be made herein to set forth the prior laws superseded by the [1968] Municipal Election Code." See J.S. App. 4a, 5a.

On July 11, 1968, the Assistant Attorney General for Civil Rights (AAG), on behalf of the Attorney General, interposed an objection to certain provisions of the 1968 Code. No objection was interposed to the change occasioned by Section 34A-1407(a) of the Code, as submitted by the State. J.S. App. 5a.

On April 8, 1971, the State of Georgia enacted local legislation, Act 546 (H.B. 793), 1971 Ga. Laws 3221, reincorporating and amending the City of Monroe's charter. The 1971 charter amendments again required that candidates for the mayor's office in Monroe receive a majority of the votes cast to be elected. The City did not submit Act 546 to the Attorney General for Section 5 review or seek a Section 5 declaratory judgment from the United States District Court for the District of Columbia. J.S. App. 5a.

In 1976, two black citizens of Monroe brought a Section 5 suit against Walton County, Georgia, and the City of Monroe. *Howard* v. *Board of Commissioners of Walton County*, No. 75-67-ATH (M.D. Ga.). The suit challenged, *inter alia*, the City's failure to obtain preclearance of its majority vote requirement and of three annexation ordinances. On July 29, 1976, the three-judge court in *Howard* enjoined enforcement of the ordinances effecting the annexations, and also enjoined enforcement of those portions of the City's 1966 and 1971 charters providing for election of the mayor and the city council by majority vote. J.S. App. 5a-6a.

The three-judge court ruled that the majority vote requirement imposed by the 1966 and 1971 amendments to the city charter was unenforceable because it had not received preclearance under Section 5. However, the court remanded the case to the originating judge on the issue of whether the majority vote provision of the 1968 Code, which "according to the parties has been approved by the Attorney General" (see J.S. App. 6a) in accordance with Section 5, applied to the City of Monroe. On the same day, the originating judge ruled that this provision of the 1968 Code—which he, too, noted had received Section 5 preclearance—applied to the City of Monroe and required election by majority vote (J.S. App. 50a).

On August 12, 1976, two weeks after the decisions in *Howard*, the City of Monroe submitted to the Attorney General the three annexation ordinances that the three-judge court had determined required Section 5 preclearance. It is undisputed that the City's submission did *not* include any request for preclearance of its adoption of a majority vote requirement for mayoral and city council elections. On October 13, 1976, the Attorney General interposed an objection to two of the annexations submitted by the City. However, the Attorney General subsequently agreed to reconsider this objection, requesting additional evidence from the City before reviewing the entire record as completed on September 29, 1977. On November 25, 1977, the Attorney General withdrew his objection to the two annexations. The withdrawal of this objection was based not on any determination as to the effect of majority voting, but rather on new information supporting a determination that the

effect of the annexations on the City's black population percentage would be *de minimis*. J.S. App. 8a-10a.[4]

On March 20, 1990, the State of Georgia enacted local legislation, Act 858 (H.B. 1972), 1990 Ga. Laws 4163, again amending the City of Monroe's charter. The 1990 charter amendment reiterated the requirement in the 1966 and 1971 amendments that candidates for the mayor's office in Monroe receive a majority of the votes cast to gain election. J.S. App. 11a.

On September 26, 1990, the City of Monroe submitted Act 858 to the Department of Justice for Section 5 preclearance. In the process of reviewing Act 858, the Department determined that the City had failed to submit for preclearance earlier voting changes directly related to the submission—among them the voting changes included in Act 150 (1966) and Act 546 (1971)—and so informed the City. On November 19, 1990, the City submitted Acts 150 and 546 for Section 5 preclearance. On July 3, 1991, the AAG, on behalf of the Attorney General, interposed a timely objection under Section 5 to the change from a plurality vote requirement to a majority vote requirement for the City of Monroe. In August 1991, and again in August 1993, the City of Monroe requested that the AAG reconsider his objection to its change to a majority

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[4] The Attorney General's withdrawal letter (Exhibit 6 to Defendant's Brief in Support of Motion for Summary Judgment) stated:

> A review of the entire record reveals that the dilution of the black population caused by these annexations was approximately one half percent and that this small degree of dilution, in the demographic and electoral context of the City of Monroe, will have no discernible racially discriminatory electoral effect.

vote requirement. On both occasions, the AAG declined to withdraw his objection,[5] and promptly notified the City of this decision. J.S. App. 11a.

For approximately three years after the AAG interposed his objection, the United States made efforts to convince the City to comply voluntarily with the Voting Rights Act. In addition, before filing suit against the City, the United States attempted to resolve this matter through negotiation of a consent decree. All such efforts were unsuccessful. The City has thus continuously implemented its unprecleared majority vote requirement for nomination and election to the mayor's office in all of its mayoral elections from 1966 to the present.

On June 3, 1994, the United States filed this civil action against the City of Monroe and its mayor, city council, council members, and city clerk (collectively, the City), alleging, *inter alia*, that the City's use of a majority vote requirement in its mayoral elections violates Section 5 of the Voting Rights Act. J.S. App. 11a.[6] On August 9, 1996, a three-judge court heard

[5] Since the July 1968 preclearance of the majority vote provision of the State of Georgia's 1968 Municipal Election Code, the Attorney General (or the AAG, acting on the Attorney General's behalf) has interposed Section 5 objections to changes from a plurality vote requirement to a majority vote requirement in more than 20 other Georgia municipalities.

[6] The complaint also alleged that the City's use of the majority vote requirement in its at-large city council elections violated Section 5, and that the use of both majority vote and at-large elections for city council members violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. However, during the course of this litigation, the United States and the City of Monroe entered into a settlement agreement resolving all issues relating to the City's method of electing council members. While we disagree with the City's characterization of the negotiations which ultimately led to that settlement, the subject matter of the settlement is not before this Court in this appeal, and thus we note only that the discussion of those negotiations (J.S. 4-5) is totally irrelevant to the questions presented here. We also dispute the accuracy of the City's assertion that, after the settlement, "the sole remaining issue in the lawsuit was whether the City of Monroe was required to submit the majority vote method of electing the Mayor for Section 5 preclearance" (J.S. 2). While this was the sole issue before the three-judge court on the parties' cross-motions for summary judgment, and is thus the sole issue now before this Court, the complaint we filed also alleged that the City's use of a majority vote requirement in mayoral elections violates Section 2. This claim has not yet been addressed by the district court, and thus, likewise, is not before this Court in this appeal.

oral argument on the parties' cross-motions for summary judgment on the Section 5 claim. The three-judge court determined that summary judgment on this claim would be appropriate because "the parties do not dispute the facts material to this litigation, but only the legal significance of those facts" (*id.* at 12a).

2. On April 15, 1997, the three-judge court granted the United States' motion for summary judgment, holding that the City's adoption of a majority vote requirement "is a covered change that has not been precleared according to the dictates of [Section] 5" (J.S. App. 36a). In a comprehensive opinion (see *id.* at 1a-37a) explicitly rejecting many of the arguments the City reiterates before this Court, the three-judge court held that (1) the United States' Section 5 claim is not barred by any preclusive effect of the earlier decisions in the *Howard* litigation (*id.* at 12a-18a); (2) the City's shift from a plurality voting scheme to a majority vote requirement in 1966 was a change covered by Section 5 (*id.* at 18a); (3) this change was not precleared as a result of the Attorney General's

failure to interpose an objection to the statewide majority vote provision, Section 34A-1407(a) of the 1968 Municipal Election Code, upon the State's submission of the Code for Section 5 review (*id.* at 18a-22a); (4) the change was not precleared as a result of any action or inaction of the Attorney General in connection with either the *Howard* litigation or the City's Section 5 submission of the annexations at issue in *Howard* (*id.* at 22a-29a); (5) the government's suit is not barred by laches (*id.* at 29a-35a); and (6) the United States "is entitled to the injunctive relief sought" (*id.* at 35a) as an appropriate remedy for the Section 5 violation it established—that is, to prospective relief in the form of an order permanently enjoining the City from implementing its majority vote requirement in mayoral elections unless and until it has obtained preclearance of this change (*id.* at 35a-37a).

The three-judge court's order granting summary judgment for the United States and entering such an injunction against the City was filed on April 15, 1997 (J.S. App. 38a-39a), and judgment was entered on April 21, 1997 (*id.* at 40a-41a). The City filed a timely notice of appeal on May 21, 1997 (*id.* at 42a-43a). Applications for a stay of the injunction pending appeal were denied by the three-judge court on June 27, 1997. On August 6, 1997, the Court granted the City's motion for a stay pending action by the Court on the statement as to jurisdiction.

ARGUMENT

None of the four "questions presented" in the Jurisdictional Statement filed by the City of Monroe (see J.S. i) presents an issue warranting this Court's plenary review, nor has any error been cited that might warrant a reversal of the decision of the three-

judge district court on the merits. The sole issue on appeal here is whether the City has complied with the preclearance requirements of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, with respect to the adoption of a majority vote requirement for its mayoral elections. The district court's determination that preclearance of this covered voting change was *never* obtained is based on an analysis consistent with the governing precedents of this Court, and should therefore be affirmed.

I. THE CITY OF MONROE'S ADOPTION OF A MAJORITY VOTE REQUIREMENT HAS NOT BEEN PRECLEARED IN ACCORDANCE WITH SECTION 5 OF THE VOTING RIGHTS ACT

A. Preclearance Of The Majority Vote Provision Of The State Of Georgia's 1968 Municipal Election Code Did Not Constitute Preclearance Of The City Of Monroe's Adoption Of A Majority Vote Requirement

The three-judge court correctly held that Section 5 preclearance of the majority vote provision incorporated in the State of Georgia's 1968 Municipal Election Code did not also preclear the prior or subsequent adoption and implementation of a majority vote requirement by any particular municipality within the State (see J.S. App. 18a-22a). This Court's decision in *City of Rome* v. *United States*, 446 U.S. 156 (1980), a Section 5 declaratory judgment action involving application of the same statewide provision to another Georgia municipality under circumstances strikingly similar to those now before the Court, directly supports the decision of the district court here. The City's proposal that this Court take advantage of the supposedly more "thorough record" developed in

the summary judgment proceedings here (J.S. 16) to revisit the issue presented in *City of Rome* should be rejected.

1. *This Court's decision in* City of Rome *fully supports the district court's decision here*

In *City of Rome*, the Court upheld a three-judge court's decision that the municipality's change to a majority vote requirement, initially made by charter amendment in 1966 and continuously implemented thereafter (just as it was in the City of Monroe), had not been precleared in accordance with Section 5. See *City of Rome* v. *United States*, 472 F. Supp. 221 (D.D.C. 1979) (three-judge court). The three-judge court in *Rome*, relying on this Court's earlier decisions in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), and *United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110 (1978), stated (472 F. Supp. at 233):

> Rome argues that its Charter, having been amended in 1966 to provide for majority voting, did not provide for plurality voting in 1968, and that therefore the 1968 Code mandated majority voting and runoff elections. * * * Therefore, in Rome's view, the granting of preclearance to the 1968 Code constituted preclearance to the majority vote, numbered post and runoff election provisions of the City Charter.
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> * * * * *
>
> We think *Allen* and *Sheffield* compel rejection of the City's theory. Georgia, in our view, submitted to the Attorney General only its decision to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts, and, possibly, its expression of a general policy in favor of majority voting. It did not, however, submit in an "unambiguous and recordable manner" all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues.

On appeal, this Court affirmed the judgment of the three-judge court, stating (446 U.S. at 169 n.6 (emphasis added)):

> We * * * reject the appellants' argument that the majority vote, runoff election, and numbered posts provisions of the city's charter have already been precleared by the Attorney General because in 1968 the State of Georgia submitted, and the Attorney General precleared, a comprehensive Municipal Election Code that is now Title 34A of the Code of Georgia. Both the relevant regulation, 28 CFR § 51.10 (1979), and the decisions of this Court require that the jurisdiction "in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for * * * consideration pursuant to the Act" [quoting *Allen*, 393 U.S. at 571], and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction [citing *Sheffield*, 435 U.S. at 137-138]. Under this standard, *the State's 1968 submission cannot be viewed as a submission of the city's 1966 electoral changes.*

Under this Court's precedents in *Allen*, *Sheffield*, and *City of Rome*, it is clear that jurisdictions subject to Section 5 must request preclearance of a cov-

ered voting change in an "unambiguous and recordable manner" (*Allen*, 393 U.S. at 571), and that the Attorney General will not be deemed to have precleared any voting change not submitted in such a manner. Moreover, in *City of Rome*, the Court explicitly held that the State of Georgia's Section 5 submission of its 1968 Municipal Election Code—the very same submission on which the City of Monroe now relies—"cannot be viewed as a submission of the [City of Rome's] 1966 electoral changes" (446 U.S. at 169 n.6).[7]

The correctness of that holding is underscored by the fact that, because Rome's city charter had been amended in 1966 to include a majority vote requirement, it would have appeared that implementation of the statewide provision would have effected no covered change to review with respect to that city. The same is true of the City of Monroe; indeed, there is no logical basis on which a different result from that obtained in *City of Rome* could be justified with respect to identical electoral changes (including the adoption of a majority vote requirement) made in the identical manner (through a 1966 charter amendment) by the City of Monroe. Thus, there is no reason for this Court to revisit in this case the essentially identical preclearance issue decided against the City of Rome. This Court's precedents make it clear that the Attorney General cannot be deemed to have precleared a city's unsubmitted charter amendment simply by

[7] Although the City suggests (J.S. 16) that the majority vote preclearance issue was not "directly litigated * * * as a primary issue" in *City of Rome*, the issue was explicitly decided by the district court, was included in the questions presented to this Court, was fully briefed for the Court, and was addressed on its merits by the Court.

virtue of having precleared a State's "decision to defer" to such charters (*City of Rome*, 472 F. Supp. at 233). Accordingly, the three-judge court here correctly held that preclearance of the statewide majority vote provision incorporated in Georgia's 1968 Code did not also preclear the adoption and implementation of a majority vote requirement by the City of Monroe.

2. *The originating judge's decision in* Howard *v.* Board of Commissioners of Walton County *has no preclusive effect in this case*

In *Howard* v. *Board of Commissioners of Walton County*, No. 75-67-ATH (M.D. Ga. July 29, 1976), a three-judge court ruled that the majority vote requirement imposed by the 1966 and 1971 amendments to the City of Monroe's charter was unenforceable because it had not received Section 5 preclearance. However, the originating judge was directed on remand to consider the application to the City of Monroe of Section 34A-1407(a) of Georgia's 1968 Municipal Election Code. As discussed earlier, Section 34A-1407(a) provides for the use of majority voting in all municipal elections statewide, *unless* a "municipal charter or ordinance, as now existing or as amended subsequent[ly], provides that a candidate may be nominated or elected by a plurality."

Although it was undisputed that the City had conducted all elections by plurality vote prior to the 1966 and 1971 charter amendments providing for majority vote elections, the originating judge found (J.S. App. 50a):

> Both of these statutes having been declared unenforceable under [Section 5], the remaining charter is silent as to whether a plurality or majority vote is required. * * * Since neither the charter

> nor an ordinance of the City of Monroe now or ever has provided for a plurality election, [Section 34A.1407(a)], which the parties have informed the court was approved by the Attorney General of the United States as required by [Section 5], clearly applies here and requires election by majority vote.

The three-judge court here properly rejected the City's contention that this suit is barred by any preclusive effect of the *Howard* decision (see J.S. App. 12a-17a). Indeed, we question whether the originating judge's opinion—which held only that the statewide provision *applied* to the City—can properly be read as deciding that the Attorney General's preclearance of Section 34A-1407(a) also precleared the City's adoption of majority voting pursuant to that provision.

Even if we assume that the court did purport to so hold, it is well-settled that the "related doctrines" of collateral estoppel and res judicata bar reconsideration of a matter "distinctly put in issue and directly determined by a court of competent jurisdiction" only in subsequent litigation "between the same parties or their privies." *Montana* v. *United States*, 440 U.S. 147, 153 (1979), quoting *Southern Pacific R.R.* v. *United States*, 168 U.S. 1, 48 (1897). Recognizing the United States' enforcement of federal law as a matter of public interest independent of the individual concerns of private citizens, as well as the tremendous burden the United States would face if forced to monitor private litigation for possible mishandling of Section 5 claims (see J.S. App. 14a), the district court here found "an insufficient identity of parties to invoke issue or claim preclusion" against the United States (*id.* at 12a). There was much upon which to base this conclusion: the United States was not a

party to the *Howard* litigation, was not in privity with the *Howard* plaintiffs, and did not participate in any other manner at any stage of the *Howard* proceedings. This Court has given "controlling" weight to the "nonparticipation of the United States and the Attorney General" in rejecting estoppel arguments under similar circumstances. See *City of Richmond* v. *United States*, 422 U.S. 358, 374 n.6 (1975).

In addition, this Court has explicitly rejected the argument that a judgment may be given preclusive effect against a non-party who had actual knowledge of the prior litigation, and an opportunity to intervene in that lawsuit, absent actual intervention. See *Martin* v. *Wilks*, 490 U.S. 755, 765 (1989). As more fully discussed below, the United States certainly cannot, as the City suggests, be deemed either to have acquiesced in the outcome of the *Howard* case (see J.S. 17) or to have precleared an unsubmitted change (see J.S. 10) by virtue of its failure to intervene.

Indeed, where there has been no government participation in an earlier case resolving a critical Section 5 issue, the Court has been particularly reluctant to accord preclusive effect to that judgment. In *City of Richmond*, a Section 5 declaratory judgment action seeking preclearance of a municipal annexation, the Court rejected the argument that the effect of the annexation was to deny or abridge the right to vote of Richmond's black community (422 U.S. at 370-372), but remanded "for further proceedings with respect to purpose alone" (*id.* at 378), holding that an annexation motivated by a discriminatory purpose is prohibited by Section 5 "whatever its actual effect * * * may be" (*id.* at 379). The Court expressly held that the Attorney General was not foreclosed from raising the issue of discriminatory purpose, even though that issue had already been raised in private

litigation challenging the same annexation and resolved in an *en banc* court of appeals decision upholding the annexation. The Court in *City of Richmond* refused to give the earlier decision "estoppel effect" in view of the "nonparticipation of the United States and the Attorney General" in that litigation (*id.* at 374 n.6). See also *Hathorn* v. *Lovorn*, 457 U.S. 255, 269 n.23 (1982) (Attorney General "is not bound by the resolution of [Section] 5 issues in cases to which [she] was not a party").

Furthermore, the single-judge court in the *Howard* litigation was not "a court of competent jurisdiction," as required by *Montana* and *Southern Pacific*, *supra*, for purposes of determining whether the City of Monroe's implementation of a majority vote requirement had been precleared in accordance with Section 5. As this Court has held, "disputes involving the coverage of [Section] 5 [must] be determined by a district court of *three* judges." *Allen*, 393 U.S. at 563 (emphasis added). Thus, the originating judge in *Howard* had jurisdiction only to interpret the meaning of the statewide majority vote provision and its applicability to the City of Monroe. He had no jurisdiction to decide what effect the preclearance of that provision had on the Section 5 status of the City's adoption of a majority vote requirement.

Moreover, it is not at all clear that the originating judge *intended* to decide the preclearance issue now before this Court. He simply stated that the statewide provision (1) "was approved by the Attorney General," (2) "clearly applies here," and (3) "requires election by majority vote" (J.S. App. 50a). He did *not* "directly determine[]" (as also required by *Montana* and *Southern Pacific*) whether the Attorney General's approval of the statewide provision constituted

approval of all voting changes brought about as a result of its application to individual municipalities.

Nor was any such "direct determination" made by the three-judge court in *Howard*, either before remanding the case to the originating judge or—as might have been expected—after his decision on remand. Once the single-judge court determined that Georgia's statewide provision required the City of Monroe to conduct majority vote elections, it was the province of the three-judge court to determine whether the City's adoption and implementation of that requirement had been submitted and precleared in accordance with Section 5. Although both courts mentioned that the statewide provision had been precleared, neither court "directly determined" whether the City's change from plurality voting to majority voting was subject to any further preclearance requirement. The fact that this final step was never taken in *Howard* is further reason why that case has no preclusive effect here.

Finally, at the time *Howard* was decided, the district court did not have the benefit of this Court's decisions in *City of Rome* and other cases discussed below in which this Court has clarified the proper scope and interpretation of Section 5. This Court has indicated that it may be inappropriate to apply preclusion principles when there has been such an intervening change in the law. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Duel*, 324 U.S. 154, 162 (1945) ("*res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation"); *Whitcomb* v. *Chavis*, 403 U.S. 124, 162-163 (1971) (opinion of White, J.) (rejecting argument that statutory plan approved by district court in 1965 was "beyond attack" in light of fact that

"disparities * * * thought to be permissible at the time of that decision had been shown by intervening decisions of this Court to be excessive"). Under all of the circumstances presented here, the three-judge court properly refused to give preclusive effect to the 1976 decision in *Howard*, and properly assessed the effect of the Attorney General's preclearance of the statewide majority vote provision on the City of Monroe's local implementation of a majority vote requirement in light of this Court's intervening decision in *City of Rome*.

B. Preclearance Of The City Of Monroe's Annexation Ordinances Did Not Constitute Preclearance Of The City's Adoption Of A Majority Vote Requirement

The three-judge court also correctly held that Section 5 preclearance of the annexation ordinances the City of Monroe submitted for review in 1976 did not constitute preclearance of the City's prior adoption and continued implementation of a majority vote requirement (see J.S. App. 22a-29a). The City argues (J.S. 6-11) that the Attorney General should be deemed to have precleared its change to majority vote elections because (1) he had actual notice of the change by virtue of both the 1976 submission of the annexations, and communications from the *Howard* plaintiffs' counsel regarding possible intervention by the United States for the purpose of appealing the originating judge's decision to this Court; and (2) after conducting an "extensive evaluation" of the City's use of majority voting, the Attorney General neither intervened in *Howard*, nor "elected * * * to interpose [a Section 5] objection" (J.S. 11) to the City's adoption of a majority vote requirement, nor requested that the City submit that change for Section 5 preclearance.

The three-judge court properly rejected those arguments, ruling that the change to majority voting in mayoral elections was not precleared as a result of any action or inaction of the Attorney General in connection with either the *Howard* litigation or the City's Section 5 submission of the annexations. As discussed above, this Court's precedents make clear that the Attorney General will not be deemed to have precleared a voting change unless it has been affirmatively and unambiguously submitted for Section 5 preclearance. See, *e.g.*, *City of Rome*, 446 U.S. at 169 n.6; *Allen*, 393 U.S. at 571; *Sheffield*, 435 U.S. at 136-138. Even when the Attorney General has actual notice that an unprecleared change is being implemented, preclearance of a different (and perhaps related) change does not render valid the unsubmitted change. See, *e.g.*, *Clark* v. *Roemer*, 500 U.S. 646, 657-659 (1991) (rejecting the argument that preclearance of an amended statute necessarily effects a preclearance of all unprecleared changes incorporated in that statute). A covered jurisdiction must *specifically and explicitly* submit a voting change in order for it to be reviewed and precleared by the Attorney General. See *Allen*, 393 U.S. at 571 (Section 5 does not "contemplate[] that a 'submission' occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner").[8]

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[8] Indeed, as the three-judge court noted here (J.S. App. 27a-28a), the requirement of a formal submission, and the policy considerations underlying that requirement, preclude adoption of the City's proposed "preclearance by estoppel" rule, which "would encourage jurisdictions aware of existing, unprecleared changes not to submit those changes for immediate preclearance" (*id.* at 28a). The court found "no tension" (*ibid.*) between its rejection of that proposal and this Court's decision in *Morris* v. *Gressette*, 432 U.S. 491 (1977), on which

Moreover, as this Court held in *McCain* v. *Lybrand*, 465 U.S. 236 (1984), preclearance of submitted voting changes is premised on the Attorney General's having *actually considered and approved* the merits of the change in question—that is, determined that the change *did not have a discriminatory purpose or effect*. See *id.* at 252-255. The three-judge court here correctly determined that, although the Attorney General's assessment of the City's 1976 submission concerning annexations may have been "conducted on the basis of the then-current electoral practices, including majority voting, the analysis conducted by the Attorney General to determine whether the annexations had a discriminatory purpose or effect is very different from an analysis comparing plurality versus majority voting" (J.S. App. 24a). The court explicitly found that "nothing in [the record] shows that the Attorney General made the difficult and complex decision that the shift from plurality to majority voting was not discriminatory in purpose or effect" (*id.* at 23a-24a). Nor was the Attorney General asked to address any such change in the submission of the annexations. Thus, preclearance of the annexations

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the City relies (J.S. 12-13), since implementation of the unprecleared provision in that case resulted from the Attorney General's failure to interpose a *timely* objection to a *formal* Section 5 submission. This Court has never held that the Attorney General's failure to act upon an *unsubmitted* change constitutes preclearance of that change. See *Sheffield*, 435 U.S. at 136 (observing that, while the Attorney General's failure to act on submitted voting changes might constitute preclearance of those practices, "the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him"). See also our discussion of "equitable preclearance" at pages 26-28, *infra*.

cannot be deemed also to have precleared the City's unsubmitted adoption of a majority vote requirement.

The City argues that *McCain* requires only "actual knowledge" and some analysis of an unprecleared change (J.S. 10), and suggests that the Court would have found "tacit preclearance" in *McCain* if there had been any evidence that the Attorney General remained silent in the face of such information (J.S. 10-11). The language quoted by the City in support of this contention, however, suggests only that this Court was unwilling to assume tacit approval of unsubmitted changes to which the Attorney General's preclearance letter made no reference, it being "unlikely that [the Attorney General] would have kept his consideration and approval of the changes * * * a secret" if he had been aware of these changes and had in fact considered and approved them. See *McCain*, 465 U.S. at 254.

The City also attempts to distinguish this case from *McCain* on the basis that a "focal point" of the Section 5 review of the annexations submitted here was "the effect the annexations would have in the context of the City's use of majority vote" (J.S. 9). However, there is no evidence that the Attorney General ever considered (much less determined) the effect of *the change from plurality to majority voting* independently—that is, *outside of the context of the proposed annexations* actually submitted for review; nor is there any evidence that the Attorney General ever considered whether that change may have been motivated by a discriminatory purpose. In the absence of any such evidence, it would be no more legitimate for this Court to infer tacit approval of the unsubmitted practice here than it was to infer such approval in *McCain*. Indeed, it cannot fairly be said that the Attorney General "elected not to interpose

an objection" to the City's use of majority voting (J.S. 11), as he had no authority to interpose such an objection without an actual submission.

The City criticizes the Attorney General's failure to request a submission in 1976, once he was made aware, during preclearance of the annexations, that the City's majority vote requirement had never been submitted and precleared (J.S. 14). It may well be that the United States *should* have requested that the City's unprecleared change to majority voting be submitted, either during the preclearance review of the annexations, or as an independent matter, when it learned that the City was implementing this covered change without preclearance. See 28 C.F.R. 51.15(b) (1971) (the Attorney General, upon learning of an unprecleared voting change, "shall advise the person or entity responsible for the alleged change of the duty to seek a declaratory judgment or to make a submission to the Attorney General before enforcement").[9] Whatever the reason for the Attorney General's decision *not* to request a submission at that time,[10] one thing is clear—the majority vote requirement *was*

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[9] Although the City characterizes this regulation as "mandatory" (J.S. 14), this Court has expressed a great "reluctan[ce] to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action" or otherwise deprives the agency of the authority to act, especially when "important public rights are at stake" and the controlling statute or regulation "nowhere specifies the consequences" of any such failure. See *Brock* v. *Pierce County*, 476 U.S. 253, 259-260 (1986).

[10] The record in this case reflects that a letter requesting submission of the unprecleared change was in fact prepared by a Justice Department attorney, but—for reasons that cannot now be determined—was never sent to the City (see J.S. App. 10a).

never submitted. This Court's precedents make clear that the responsibility of submitting proposed voting changes falls to the covered jurisdiction. See, *e.g.*, *McCain*, *supra*. That responsibility never was fulfilled in this case; thus, as nothing short of an "unambiguous" submission can properly result in preclearance, it follows that an unsubmitted change cannot be "tacitly" precleared by the Attorney General's failure to request a submission.

Accordingly, the three-judge court correctly held that preclearance of the annexations submitted by the City of Monroe in 1976 did not also preclear the City's unsubmitted change to majority voting.

II. THE ATTORNEY GENERAL'S SUIT IS NOT BARRED BY LACHES

The three-judge court likewise properly concluded that the Attorney General is not legally or equitably barred from pursuing a Section 5 remedy in court by virtue of having failed either to request a Section 5 submission, or to file a Section 5 action seeking to enjoin implementation of the unprecleared change, upon learning of a covered voting change that has not been submitted for Section 5 review (see J.S. App. 29a-35a). This is a logical corollary to the requirement of a formal submission for preclearance previously discussed. As this Court stated in *Clark*, 500 U.S. at 658-659, Congress put the burden of submitting voting changes for preclearance on covered jurisdictions because it recognized that the Attorney General's many duties and responsibilities, and the Department of Justice's "limited resources," make it impossible for them to "monitor and identify each voting change in each jurisdiction" subject to Section 5, and to "investigate independently all changes with respect to voting enacted by States and subdivisions covered

by the Act." Likewise, the Department does not have the resources to participate in every Section 5 lawsuit brought by private litigants, or to prosecute independently every violation of the law. Thus, no legal consequence can fairly be attributed to the Attorney General's failure to address an unsubmitted voting change, to file a Section 5 lawsuit against a covered jurisdiction, or to participate in a private lawsuit under Section 5.

Moreover, since the Attorney General has neither the obligation nor, indeed, the authority to preclear a voting change in the absence of a Section 5 submission, the United States cannot be precluded from challenging an unsubmitted voting change, notwithstanding any earlier failure to respond to information that a covered change has not been submitted for preclearance. Because the passage of time does not in any way negate the Attorney General's duty to "protect[] a public interest of the highest significance—the right of all citizens to participate equally in the processes of democratic governance" (J.S. App. 32a)—the three-judge court correctly held that "the instant case falls well within the core of cases in which the United States is immune from the doctrine of laches" (*id.* at 33a). See, *e.g.*, *United States* v. *Beebe*, 127 U.S. 338, 344 (1888) (United States cannot be barred by laches in a suit brought "as a sovereign Government to enforce a public right, or to assert a public interest"), citing *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886), and cases cited therein;[11]

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[11] The City relies on *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), for the contrary proposition (see J.S. 12-13). However, as the three-judge court here explained (see J.S. App. 30a-32a), reliance on laches as grounds for dismissal of an EEOC action, explicitly limited in *Occidental Life*

Guaranty Trust Co. v. *United States*, 304 U.S. 126, 132-133 (1938); *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986); *United States* v. *Louisiana*, 952 F. Supp. 1151, 1176 (W.D. La.) (three-judge court), aff'd mem., 117 S. Ct. 2476 (1997).[12]

Application of the doctrine of laches to the United States seems particularly inappropriate in the context of a Section 5 suit. As this Court has recognized, Congress's very purpose in enacting Section 5 was "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966). Permitting a covered State or locality that has failed to comply with Section 5's preclearance requirements to invoke the doctrine of laches in a suit brought by the Attorney General to vindicate the public interest would thus frustrate Section 5's central objective. Cf. *Brooks* v. *State Board of Elections*, 775 F. Supp. 1470, 1481-1482 (S.D. Ga. 1989) (three-judge court) (rejecting the argument that laches may require it to "equitably preclear" a voting change, on the ground

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to situations where a defendant can show actual prejudice as a result of the EEOC's inordinate delay (see 432 U.S. at 373), has been further limited by the lower courts to suits in which the government is functioning not in its sovereign capacity, but rather as a nominal party seeking relief on behalf of a private complainant.

[12] Having so ruled, the three-judge court found no need to address the argument that "the lack of preclearance could be seen as a 'continuing violation' [of Section 5] and thus saved from a laches bar" (J.S. App. 30a-31a n.18)—an argument which could provide an alternative basis for affirming the decision below. See, *e.g.*, *Dotson* v. *City of Indianola*, 514 F. Supp. 397, 401 (N.D. Miss. 1981) (three-judge court) (Section 5 is violated each time municipal elections are conducted using unprecleared voting changes; thus, "the vice of * * * past non-compliance survives unabated as a present violation").

that it "would do violence to the heart of section 5 if we were to excuse the State's failure to seek preclearance merely because the State has been disregarding section 5 for a long time"), aff'd mem., 498 U.S. 916 (1990).

III. NO QUESTION IS PRESENTED IN THIS APPEAL CONCERNING THE ATTORNEY GENERAL'S AUTHORITY UNDER SECTION 2 OF THE VOTING RIGHTS ACT

Contrary to the City's assertion (see J.S. 2, 15-16), this appeal does *not* present any issue concerning the Attorney General's authority under Section 2 of the Voting Rights Act, 42 U.S.C. 1973. The sole issue before the three-judge court on the parties' cross-motions for summary judgment was whether the City's adoption and implementation of a majority vote requirement in its mayoral elections had been precleared as required by Section 5. Any negotiations the Department of Justice may have had with the City concerning the application of Section 2 to other voting practices were totally irrelevant to the issue before the three-judge court on these motions, and the City's discussion of these negotiations (see J.S. 4-5) is likewise totally irrelevant to the issue presented in this appeal.

The City's suggestion (J.S. 16) that the Attorney General has abused her Section 5 authority to obtain a Section 2 remedy in this case is simply unfounded. The proceedings below were entirely consistent with this Court's decisions limiting the issues for determination by the local three-judge court in a Section 5 suit brought by the Attorney General or by a private litigant to (1) whether the state or local practice being challenged is a change covered by Section 5; (2) if so, whether the State or locality has complied with

Section 5's preclearance requirements; and (3) if there has been no such compliance, the appropriate relief to be afforded to the plaintiffs. See, *e.g.*, *Perkins* v. *Matthews*, 400 U.S. 379, 383, 396-397 (1971); *United States* v. *Board of Supervisors of Warren County*, 429 U.S. 642, 645-646 (1977) (per curiam); *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983). After determining that the City of Monroe's adoption of a majority vote requirement was a covered change that had *not* been precleared in accordance with Section 5, the three-judge court correctly determined that injunctive relief prohibiting the City from implementing the unprecleared change is an appropriate Section 5 remedy (J.S. App. 35a-37a). See *Clark*, 500 U.S. at 652-653; *Lopez* v. *Monterey County*, 117 S. Ct. 340, 347 (1996) (error for the district court to refuse to enjoin an unprecleared county judicial election plan, even though the injunction would leave the county without a plan).

There is no basis whatsoever for reading the decision below as allowing the Attorney General to "achieve a Section 2 remedy" in the absence of any evidence or findings of intentional discrimination against minority voters. The local three-judge court determined only that the City's majority vote requirement for mayoral elections had not in fact been precleared by the Attorney General; the court did *not* determine whether there was any legitimate basis for the Attorney General's refusal to preclear this change. Indeed, this district court had no jurisdiction to make any decision on the merits as to whether the covered change does or does not have the purpose or effect of denying or abridging the right to vote on account of race or color. That determination is expressly reserved under Section 5 for consideration either by the Attorney General or by the United

States District Court for the District of Columbia. See *Perkins*, 400 U.S. at 385; *Warren County*, 429 U.S. at 645; *City of Lockhart*, 460 U.S. at 129 n.3.

Thus, to the extent that the City may be complaining that the Attorney General improperly applied Section 2 standards in refusing to preclear majority vote elections for mayor when that covered change was finally submitted for Section 5 review in 1990, the complaint has been addressed to the wrong forum. Such a contention is properly made in a request for administrative review under Section 5 to the Attorney General or in a Section 5 declaratory judgment suit seeking preclearance of a covered change by a three-judge court in the District of Columbia, not in a Section 5 enforcement action before a local three-judge court seeking to enjoin the use of an unprecleared change. Nothing in the decision on appeal here, or in the proceedings leading to that decision, in any way precludes the City of Monroe from taking such action.[13] If the City is successful in that action, the injunction challenged here will have no further effect on its ability to implement majority voting in its mayoral elections.

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[13] In fact, the City on August 1, 1997, requested that the Attorney General reconsider her objection to Monroe's majority vote requirement in mayoral elections. That request is currently under consideration.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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